

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEMAR DEAN PRICE,

Defendant-Appellant.

UNPUBLISHED

March 27, 2014

No. 312724

Wayne Circuit Court

LC No. 10-001596-FH

Before: M. J. KELLY, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of possession with intent to deliver less than 50 grams of a mixture containing cocaine and heroin, MCL 333.7401(2)(a)(iv), delivery/manufacture marijuana, MCL 33.7401(2)(d)(iii), felon in possession of a firearm, MCL 750.224f, and felony firearm, MCL 750.227b. We affirm.

After Highland Park police officers received a tip that narcotics were being sold by a particularly described man from houses located across from each other at 184 and 185 Hill Street, surveillance was conducted. The officers noticed three or four individuals entering the house at 184 Hill Street, staying about 30 seconds to a minute, and then exiting. They also saw defendant walk from the area of the house at 185 Hill Street, cross the street, and enter the front door of the house at 184 Hill Street. Defendant remained in the house for about three to five minutes, then exited and began walking down the sidewalk. Defendant fit the tipster's description of the narcotics seller so the officers exited their vehicle, approached defendant and asked him "if he had anything on his person that he should not have." Defendant admitted that he had some marijuana in his pocket. One of the officers then reached into defendant's pocket and retrieved the marijuana. Defendant was arrested and searched. A key to 185 Hill Street and over \$800 in small bills were found on defendant. Defendant was also questioned at the police station. He admitted that he was coming from 184 Hill Street when he was stopped by police, that he lived there, and that he had told the police that he had marijuana.

Thereafter, the police obtained a search warrant for 184 Hill Street, but a search warrant was not required with regard to 185 Hill Street because it was confirmed to be vacant property. The search of the house at 184 Hill Street resulted in the following items being seized: (1) a

baggy containing 12 packets of crack cocaine; (2) eight paper lottery folds each containing heroin; (3) a baggy containing marijuana; (4) a large amount of loose marijuana; (5) a digital scale; (6) \$23.00; (7) a narcotics ledger; (8) a box of baggies; and (9) two cell phones. The search of the house at 185 Hill Street resulted in the following items being seized: (1) a loaded 22-caliber semiautomatic handgun; (2) a baggy containing 80 small packages of crack cocaine; (3) a baggy containing 40 packets of crack cocaine; (4) a baggy containing 20 lotto tickets made into packets and each containing heroin; (5) two pill bottles with defendant's name on them; and (6) a bulletproof-type vest. After the searches were conducted, the police questioned defendant again. Defendant admitted to selling narcotics to make a living for himself and his family. Defendant was charged with possession with intent to deliver less than 50 grams of a mixture containing cocaine and heroin, delivery/manufacture marijuana, felon in possession of a firearm, and felony firearm. He was convicted of the charges following a bench trial.

Defendant then filed a motion for a new trial, arguing that he was denied the effective assistance of counsel because his counsel did not seek the identity of the police informant and did not seek the production of this witness at trial. Defendant argued that if his attorney had made such requests, it may have been determined that the alleged informer did not exist. Further, defendant argued, if the informer was required to testify, there was a reasonable probability that the informer's description of the narcotics seller on Hill Street would not match defendant's description. The prosecution opposed the motion, arguing that the identity of the informant was irrelevant because defendant's arrest and the charges against him did not result from the informer's information. Accordingly, the prosecution argued, defendant failed to establish that his counsel was ineffective for any decisions related to the informant. The trial court agreed with the prosecution and denied the motion for new trial. This appeal followed.

Defendant argues that he was denied the effective assistance of counsel because his attorney failed to request the identity of the police informant and failed to request that the informant be produced at trial. We disagree.

We review a trial court's decision to deny a motion for new trial for an abuse of discretion, i.e., a decision that falls outside the range of reasonable and principled outcomes. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003); *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). A claim of ineffective assistance of counsel presents a mixed question of fact and constitutional law. *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). The trial court's factual findings are reviewed for clear error, and constitutional issues are reviewed de novo. *Id.* at 484-485. "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008) (quotation marks and citation omitted).

"In reviewing a defendant's claim of ineffective assistance of counsel, the reviewing court is to determine (1) whether counsel's performance was objectively unreasonable and (2) whether the defendant was prejudiced by counsel's defective performance." *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Regarding the latter, the defendant must show that the result of the proceeding was fundamentally unfair or unreliable, and that but for counsel's poor performance there is a reasonable probability that the result would have been different. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

“Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.” *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). Defense counsel has wide discretion as to matters of trial strategy. *People v Heft*, 299 Mich App 69, 83; 829 NW2d 266 (2012). Decisions as to what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012); *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). To overcome that presumption, a defendant must show that counsel’s failure to call a witness deprived him of a substantial defense. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009) (quotation marks and citation omitted). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel’s competence with the benefit of hindsight. *Id.*

Here, defendant argues that he had the right to know the identity of the informant and the right to have the informant produced at trial because “the informant’s alleged description of an individual matching characteristics of [defendant] is the only person identified at trial that could tie [defendant] to the alleged sale of illegal drugs and the gun found at 185 Hill Street (the unoccupied, uninhabitable house).” Defendant also argues that if his attorney had made such requests, it may have been determined that the alleged informer did not exist. Further, if the informer did exist and was required to testify, there was a reasonable probability that the informer would testify that the description of the narcotics seller on Hill Street given to the police did not match defendant’s description.

Generally, the identity of an informant is privileged from disclosure. *People v Sammons*, 191 Mich App 351, 368; 478 NW2d 901 (1991). A prosecutor should disclose the identity of an informant if the disclosure is relevant or helpful to the defense or is essential to a fair determination of the case. *People v Cadle*, 204 Mich App 646, 650; 516 NW2d 520 (1994), overruled in part on other grounds *People v Perry*, 460 Mich 55 (1999). Further, if the defendant demonstrates a possible need for the informant’s testimony, the trial court may order the informant produced and may conduct an *in camera* hearing to determine if the informant could offer any testimony helpful to the defense. *People v Underwood*, 447 Mich 695, 706-707; 526 NW2d 903 (1994). Whether there is a possible need for the informant’s testimony is determined by considering the “crime charged, the possible defenses, the possible significance of the informer’s testimony, and other relevant factors.” *Id.* at 705, citing *Roviaro v United States*, 353 US 53, 62; 77 S Ct 623; 1 L Ed 2d 639 (1957).

Here, defense counsel was not ineffective for failing to request the trial court to order the prosecution to disclose the identity of the informant and produce that person at trial. The informant simply could not offer any testimony that was relevant or helpful to the defense in this case. As the police officers both testified, the informant merely tipped the police off to the fact that narcotics were being sold from the houses at 184 and 185 Hill Street by a particularly described man. Relying on that information, the police officers conducted surveillance of those houses. After defendant was seen leaving the house at 184 Hill Street, he was stopped for questioning because he fit the provided description. However, defendant was not arrested until after he volunteered that he was in possession of marijuana and the marijuana was recovered

from his pocket. Therefore, it is clear that defendant was not arrested merely because he fit the description of the narcotics seller given by the police informant. “Trial counsel is not required to advocate a meritless position.” *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Further, after his arrest, defendant was searched and a key to 185 Hill Street was recovered from him, as well as over \$800 in mostly small bills. Defendant was also questioned at the police station. The questions defendant was asked and his answers were written down. Defendant initialed his answers and he signed the statement. Those questions and answers included the following:

Q. When Detective Barnes, myself, asked if you had anything on your person, you replied some weed?

A. Yes, a bag of weed.

Q. Do you reside at 184 Hill Street?

A. Yes.

Thereafter, the police searched the houses at 184 and 185 Hill Street and a significant amount of crack cocaine, heroin, and marijuana were recovered, as well as a digital scale, a narcotics ledger, baggies, cell phones, a loaded 22-caliber semiautomatic handgun, pill bottles in defendant’s name, and a bullet proof-type vest. After the search was conducted, defendant was questioned again. The questions defendant was asked and his answers were written down. Defendant initialed his answers and he signed the statement. Those questions and answers included the following:

Q. Do you sell narcotics to make a living for you and [your] family?

A. Yes.

It is clear that the charges against defendant were not based on the police informant’s description of the narcotics seller at 184 and 185 Hill Street; consequently, we reject defendant’s claim that the information provided by the informant was the evidence that “tie[d] defendant to the alleged sale of illegal drugs and the gun found at 185 Hill Street.” The identity of the police informant was not relevant or helpful to the defense of the charges and was not essential to the fair determination of the case; thus, the prosecution was not required to disclose the identity of the informant and defense counsel was not ineffective for failing to request the identity of the informant. See *Snider*, 239 Mich App at 425. Further, because defendant could not demonstrate a possible need for the informant’s testimony, defense counsel was not ineffective for failing to request that the informant be produced at trial. See *id.* Even if it was established that the informant did not exist or that defendant did not fit the description given by the informant such evidence would not be exculpatory. Defendant’s arrest and the charges against him were not the result of the information provided by an informant. Defendant’s admissions, the police officers’ testimony, and the evidence seized during the searches of defendant and the houses supported

defendant's arrest, the charges against him, and the convictions. Thus, defendant has failed to establish that his counsel's performance was objectively unreasonable or that he was prejudiced by his counsel's defective performance. See *Rockey*, 237 Mich App at 76. Accordingly, the trial court did not abuse its discretion when it denied defendant's motion for a new trial.

Affirmed.

/s/ Michael J. Kelly

/s/ Mark J. Cavanagh

/s/ Karen M. Fort Hood